Supreme Court, U.S.
FILED
JUL 31 1991
OFFICE OF THE CLERK

No. 90-6113

# In the Supreme Court of the United States

OCTOBER TERM, 1991

RANDALL D. WHITE, PETITIONER

*v.*

STATE OF ILLINOIS

*ON WRIT OF CERTIORARI*
*TO THE APPELLATE COURT OF ILLINOIS,*
*FOURTH JUDICIAL CIRCUIT*

## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

KENNETH W. STARR
*Solicitor General*

ROBERT S. MUELLER, III
*Assistant Attorney General*

WILLIAM C. BRYSON
*Deputy Solicitor General*

STEPHEN L. NIGHTINGALE
*Assistant to the Solicitor General*
*Department of Justice*
*Washington, D.C. 20530*
*(202) 514-2217*

## QUESTION PRESENTED

During petitioner's trial on charges arising from a sexual assault, the State introduced evidence of out-of-court statements by the victim that were admissible under hearsay exceptions for spontaneous declarations and for statements made to medical personnel for purposes of medical treatment. The question presented is whether the Confrontation Clause required the State to demonstrate that the victim was unavailable to testify at trial before the victim's out-of-court statements would be admissible.

## TABLE OF CONTENTS


| | Page |
|---|---|
| Interest of the United States | 1 |
| Statement | 1 |
| Summary of argument | 4 |
| Argument: | |
| I. The Confrontation Clause did not require the State to show that S.G. was unavailable before her out-of-court statements could be admitted into evidence | 7 |
| A. A showing of unavailability is not a general precondition for the admission of all out-of-court declarations offered against a criminal defendant | 7 |
| B. The rationale of the unavailability requirement does not apply to the hearsay exceptions at issue in this case | 10 |
| II. S.G. was not a "witness against" petitioner within the meaning of the Confrontation Clause | 17 |
| A. The Confrontation Clause was not designed to police the development of exceptions to the hearsay rule | 20 |
| B. This Court's decisions do not require the court to hold that every hearsay declarant whose statement is offered by the prosecution is a "witness against" the defendant | 25 |
| Conclusion | 29 |


## TABLE OF AUTHORITIES

Cases:


| | |
|---|---|
| *Aveson* v. *Kinnaird*, 6 East 188, 102 Eng. Rep. 1258 (1805) | 14 |
| *Barber* v. *Merriam*, 93 Mass. (11 Allen) 322 (1865) | 14 |
| *Barber* v. *Page*, 380 U.S. 719 (1968) | 26 |
| *Berger* v. *California*, 393 U.S. 314 (1969) | 26 |
| *Bourjaily* v. *United States*, 483 U.S. 171 (1987) | 19, 27 |

Cases—Continued: Page

*Bridges* v. *Wixon*, 326 U.S. 135 (1945) ..... 26
*Brookhart* v. *Janis*, 384 U.S. 1 (1966) ..... 26
*Bruton* v. *United States*, 391 U.S. 123 (1968) ..... 26
*California* v. *Green*, 399 U.S. 149 (1970) .....7, 19, 23, 26
*Commonwealth* v. *Hackett*, 84 Mass. (2 Allen) 136 (1861) ..... 13
*Commonwealth* v. *M'Pike*, 57 Mass. (3 Cush.) 181 (1849) ..... 13
*Coy* v. *Iowa*, 487 U.S. 1012 (1988) ..... 17, 21
*Delaney* v. *United States*, 263 U.S. 586 (1924) ..... 26
*Diaz* v. *United States*, 223 U.S. 442 (1912) ..... 26
*Douglas* v. *Alabama*, 380 U.S. 415 (1965) ..... 26
*Dowdell* v. *United States*, 221 U.S. 325 (1911) ..... 26
*Dutton* v. *Evans*, 400 U.S. 74 (1970) .....19, 20, 26
*Ferrior* v. *Duckworth*, 902 F.2d 545 (7th Cir.), cert. denied, 111 S. Ct. 526 (1990) ..... 14
*Gannett Co.* v. *DePasquale*, 443 U.S. 368 (1979) ..... 22
*Howe* v. *Plainfield*, 41 N.H. 135 (1860) ..... 14
*Idaho* v. *Wright*, 110 S. Ct. 3139 (1990) ..13, 14, 19, 27, 28
*Insurance Co.* v. *Mosley*, 75 U.S. (8 Wall.) 397 (1869) ..... 13
*Kentucky* v. *Stincer*, 482 U.S. 730 (1987) ..... 16
*Kirby* v. *United States*, 174 U.S. 47 (1899) ..... 26
*Lee* v. *Illinois*, 476 U.S. 530 (1986) ..... 19
*Mancusi* v. *Stubbs*, 408 U.S. 204 (1972) ..... 26
*Maryland* v. *Craig*, 110 S. Ct. 3157 (1990) .....16, 17, 18, 19, 20
*Mattox* v. *United States*, 156 U.S. 237 (1895) ..... 20, 24, 26, 27
*Morgan* v. *Foretich*, 846 F.2d 941 (4th Cir. 1988) .. 14
*Motes* v. *United States*, 178 U.S. 458 (1900) ..... 26, 27
*Ohio* v. *Roberts*, 448 U.S. 56 (1980) .....4, 6, 7, 8, 19, 20, 25, 27
*Patton* v. *Freeman*, 1 N.J.L. 113 (1791) ..... 24
*People* v. *Hughey*, 194 Cal. App. 3d 1383, 240 Cal. Rptr. 269 (1987) ..... 14
*Pointer* v. *Texas*, 380 U.S. 400 (1965) ..... 25, 26
*Puleio* v. *Vose*, 830 F.2d 1197 (1st Cir. 1987) ..... 13
*Reynolds* v. *United States*, 98 U.S. 145 (1878) ..... 26
*Roberts* v. *Russell*, 392 U.S. 293 (1968) ..... 26
*Robertson* v. *Baldwin*, 165 U.S. 275 (1897) ..... 26



Cases—Continued: Page

*Salinger* v. *United States*, 272 U.S. 542 (1926) ..... 24
*Snowden* v. *United States*, 2 App. D.C. 89 (1893) .. 13
*Snyder* v. *Massachusetts*, 291 U.S. 97 (1934) ..... 26
*State* v. *Palomo*, 113 Wash. 2d 789, 783 P.2d 575 (1989), cert. denied, 111 S. Ct. 80 (1990) ..... 14
*Tennessee* v. *Street*, 471 U.S. 409 (1985) ..... 16
*Thompson* v. *Trevanion*, 90 Eng. Rep. 179 (1693) .. 13
*United States* v. *Inadi*, 475 U.S. 387 (1986) .4, 7, 8, 9, 10, 12, 14
*United States* v. *Iron Shell*, 633 F.2d 77 (8th Cir. 1980), cert. denied, 450 U.S. 1001 (1981) ..... 14
*United States* v. *Owens*, 484 U.S. 554 (1988) ..... 7

Constitution, statute, and rules:

U.S. Const.:
Amend. V ..... 22
Amend. VI (Confrontation Clause) ..... *passim*
Amend. XIV ..... 25
Business Records Act, 28 U.S.C. 1732 ..... 12
Fed. R. Evid.:
Rule 801(d) ..... 8
Rule 801(d)(2)(E) ..... 9
Rule 803 ..... 8, 12
Advisory Committee note (28 U.S.C. App. at 777-778) ..... 11, 12
Rule 803(2) ..... 1
Rule 803(4) ..... 1

Miscellaneous:

1 Annals of Congress 756 (1789) (*reprinted in* 5 P. Kurland & R. Lerner, *The Founders' Constitution* (1987) ..... 23
3 W. Blackstone, *Commentaries on the Law of England* (1768) ..... 24
E. Cleary, *McCormick on Evidence* (3d ed. 1984) .....12, 13, 14
E. Dumbauld, *The Bill of Rights* (1957) ..... 23
9 W. Holdsworth, *History of the English Law* (1926) .....21-22, 23
Pollitt, *The Right of Confrontation: Its History and Modern Dress*, 8 J. Pub. L. 381 (1959) ..... 21, 23

Miscellaneous—Continued: Page

B. Schwartz, *The Bill of Rights: A Documentary History* (1971):
Vol. 1 ..... 12
Vol. 2 ..... 12
1 J. Stephen, *A History of the Criminal Law of England* (1883) ..... 21, 22, 23
J. Story, *Commentaries on the Constitution of the United States* (1833) ..... 24
2 N. Webster, *An American Dictionary of the English Language* (1828) ..... 18
4 J. Weinstein & M. Berger, *Weinstein's Evidence* (1990 & Supp. Apr. 1991) ..... 13, 14
*J. Wigmore on Evidence* (Chadbourne rev. ed. 1974):
Vol. 5 ..... 12, 21, 23, 24, 25
Vol. 6 ..... 13, 14

# In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 90-6113

RANDALL D. WHITE, PETITIONER

*v.*

STATE OF ILLINOIS

*ON WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FOURTH JUDICIAL CIRCUIT*

## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

### INTEREST OF THE UNITED STATES

Under Fed. R. Evid. 803(2) and 803(4), evidence of excited utterances and statements to medical personnel for purposes of medical treatment are admissible regardless of whether the declarant is available to testify. This case presents the question whether the Confrontation Clause allows the introduction of such statements if the declarant is available but does not testify at trial. The Court's answer to that question will govern the use of those types of statements in both state and federal prosecutions, and it may also affect a number of other hearsay exceptions recognized by the Federal Rules of Evidence.

### STATEMENT

1. During the early morning hours of April 16, 1988, Tony DeVore was babysitting for S.G., a four-year-old

girl, and S.G.'s three-year-old brother. After putting the children to bed in their mother's bedroom, DeVore fell asleep on a couch downstairs. At around 4 a.m., DeVore was awakened by S.G.'s scream. DeVore went upstairs and saw petitioner, whom she had met, leave the bedroom. Petitioner told DeVore that S.G. "woke up screaming." Petitioner then left the house. S.G. was crying when DeVore reached the bedroom. DeVore testified that when she asked S.G. what had happened, S.G. replied that "Randy" had put his hand over her mouth, choked her, threatened to whip her and to have DeVore whip her if she screamed, and touched her in her "private places"—*i.e.*, the vaginal area. (Petitioner and S.G.'s mother had dated one another, and S.G. had met petitioner.) J.A. 19-21; VI R. 11-12, 15-17, 24, 89.[1]

S.G.'s mother, Tammy Grigsby, arrived home shortly thereafter. After speaking briefly with DeVore, Grigsby asked S.G., who appeared scared and "a little hyper," what had happened. According to Grigsby's trial testimony. S.G. replied that "she woke up and that Randy was in the room. And that he put his hand on her mouth and told her that if she screamed that he would, you know, whip her, and Tony [DeVore] would whip her too. And then she said that he put his mouth on her front part." J.A. 21-22; VI R. 77-80.

Grigsby called the police. and Officer Terry Lewis arrived at 4:47 a.m. When Lewis spoke with her, S.G. seemed upset, nervous, and uneasy, but was cooperative. In response to Lewis's questions, S.G. provided a description of the incident that was essentially identical to her statements to DeVore and Grigsby, except that S.G. told Lewis that Randy had gotten her underpants wet by "pull[ing] her pants to one side and us[ing] his tongue on her private parts, what she called her private parts." J.A. 22-23; VI R. 109-112.

---

[1] Citations to "VI R." and "VII R." refer to the two-volume trial transcript.



At 8 a.m. the same morning, S.G. was taken to a hospital emergency room. An emergency room nurse, Cheryl Reents, spoke with S.G. in order to obtain a history to assist in S.G.'s treatment and diagnosis. In response to Reents' questions regarding whether she had been touched anywhere other than her mouth and neck, S.G. replied that she had been touched on her "front part" by Randy's mouth. Similarly, S.G. told Dr. Michael Meinzen, the physician on duty at the emergency room, that "Randy" had "put his hands over her mouth and on her neck" and had "put his mouth down there," pointing in the direction of her genitalia. J.A. 24-26; VI R. 47-51; VII R. 8-12.

At petitioner's trial, DeVore, Grigsby, Lewis, Reents, and Meinzen were permitted, over petitioner's objections, to testify regarding S.G.'s statements. The State made two attempts to call S.G. as a witness, but she experienced "emotional difficulty" when she was brought to the courtroom and left without testifying. J.A. 14; see *id.* at 12-15; VI R. 106-107, 122-123; VII R. 2-5. Petitioner made no effort to call S.G. to the stand, and the trial court was not asked by either party to determine whether she was legally available to testify. See VI R. 105-106.

2. The Appellate Court of Illinois, Fourth Judicial Circuit, affirmed the convictions. The court held that S.G.'s statements to DeVore, Grigsby, and Officer Lewis were admissible under the State's exception to the hearsay rule for "spontaneous declarations." Under Illinois law, that exception authorizes admission of "statement[s] relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." J.A. 27; see *id.* at 33-36. Similarly, the court found that S.G.'s statements to nurse Reents and Dr. Meinzen were admissible under a state statute providing for the admission of "statements made by the victim [of specified offenses] to medical personnel for purposes of medical diagnosis or treatment." J.A. 37-39.

The appellate court rejected petitioner's contention that the Confrontation Clause prohibited the admission of S.G.'s statements because she was not shown to be unavailable to testify. Following this Court's decision in *United States* v. *Inadi*, 475 U.S. 387, 391-394 (1986), the state court held that with respect to most types of hearsay, "[w]hether the out-of-court declarant is unavailable is totally irrelevant to the determination of whether an out-of-court statement of that declarant is admissible under an exception or exemption to the hearsay rule." J.A. 42.

## SUMMARY OF ARGUMENT

S.G.'s out-of-court statements were admitted under two well-recognized exceptions to the hearsay rule: the exception for excited utterances, and the exception for statements made to medical personnel for purposes of diagnosis or treatment. The rules of evidence in Illinois, as in the federal courts and other American jurisdictions, provide that out-of-court statements are admissible under those exceptions regardless of whether the declarant is available to testify. We submit that the Confrontation Clause does not override those well-settled hearsay exceptions and require that such statements be excluded unless the declarant testifies or is shown to be unavailable.

I. In *Ohio* v. *Roberts*, 448 U.S. 56, 65 (1980), this Court stated that "the prosecution must either produce, or demonstrate the unavailability of, the declarant" in order to introduce evidence of an out-of-court statement. Although *Roberts* characterized that principle as a general one, the Court in *United States* v. *Inadi*, 475 U.S. 387, 392-394 (1986), made clear that the quoted language from *Roberts* was intended to apply only to prior testimony, the kind of evidence at issue in that case.

*Inadi* set forth two reasons why a requirement of unavailability should not be extended to all hearsay exceptions. Both reasons are applicable to the statements at issue here. First, some hearsay declarations are made



under circumstances that make them highly probative in their own right, without regard to what the declarant might say as a witness at trial. Like the co-conspirator declarations at issue in *Inadi*, the victim's statements in this case were not merely a less desirable substitute for in-court testimony, but carried special guarantees of reliability derived from the setting in which they were made. S.G.'s statements to her babysitter, her mother, and Officer Lewis were made when the assault was foremost in her mind and while she was still under the emotional effect of the incident. Under those circumstances, a declarant is unlikely to have suffered loss of memory about the events or to have had sufficient opportunity to fabricate a false account of it. Similarly, S.G.'s statements to the nurse and doctor in the emergency room were likely to be reliable because they were made shortly after the event and for the purpose of obtaining medical treatment. In that setting, a declarant typically perceives that it is important to give a careful and accurate account of the events that led to the need for medical treatment, and the risk of fabrication or careless recounting is therefore minimized.

Second, the burdens and benefits associated with petitioner's position weigh heavily against it. A requirement that the prosecutor produce the declarant or demonstrate the declarant's unavailability as a condition of introducing the declarant's out-of-court statements into evidence would impose a purposeless burden on prosecutors and the courts. To preserve their ability to introduce out-of-court statements, prosecutors would have to produce—or demonstrate the unavailability of—even those declarants whom neither side wishes to examine. Courts would be called upon to resolve inevitable disputes over whether declarants were truly unavailable. That burden is unnecessary to protect defendants, who may exercise their right to compulsory process to secure the presence of any available witnesses they actually wish to examine.

II. More fundamentally, S.G. was not a "witness against" petitioner within the meaning of the Confrontation Clause. That term should be reserved, in accordance with its ordinary meaning, for live witnesses and those declarants whose prior testimony, affidavits, confessions, or other similar statements are made in the course of or in anticipation of litigation. Statements made without a view to pending or anticipated legal proceedings do not constitute testimony by a "witness."

The history of the Confrontation Clause does not support the view that all hearsay declarants are "witnesses." The common-law right to confrontation, which was incorporated in the Bill of Rights, arose in response to the once-common English practice of using depositions, affidavits, and other similar statements in lieu of live testimony in criminal trials. There is no indication in the historical materials that the common-law confrontation right was meant as a general limitation on the development of the hearsay rule and its exceptions.

For nearly 200 years, the hearsay rule and its exceptions evolved in this country without any suggestion by this Court that all persons who make out-of-court statements that are later introduced into evidence are "witnesses against" a defendant. Most of this Court's Confrontation Clause cases, like *Ohio* v. *Roberts*, involved prior testimony or its functional equivalent. With regard to such statements, it is historically accurate to say that the declarants serve as "witnesses against" the defendant. It was therefore proper for the Court to require the prosecution to produce the declarant or establish his unavailability as a precondition to introducing his out-of-court statement. But the historical concerns addressed by the Confrontation Clause do not justify extending that requirement to all out-of-court statements. A declarant who makes a statement for reasons unrelated to pending or anticipated litigation is not a "witness against" the defendant even if the statement is ultimately used to aid in the defendant's prosecution. State-



ments of that kind, including the statements at issue in this case, are therefore properly regulated by the rules of hearsay, not by the Confrontation Clause.

## ARGUMENT

### I. THE CONFRONTATION CLAUSE DID NOT REQUIRE THE STATE TO SHOW THAT S.G. WAS UNAVAILABLE BEFORE HER OUT-OF-COURT STATEMENTS COULD BE ADMITTED INTO EVIDENCE

#### A. A Showing of Unavailability Is Not A General Precondition For The Admission Of All Out-Of-Court Declarations Offered Against A Criminal Defendant

Petitioner contends that the Confrontation Clause establishes a "rule of necessity" under which a declarant's out-of-court statements are inadmissible unless the declarant is shown to be unavailable to testify at trial. As support for that view, petitioner relies primarily on *Ohio* v. *Roberts*, 448 U.S. 56 (1980). In *Roberts*, the Court observed that "[i]n the usual case (including cases where prior cross-examination has occurred), the prosecution must either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant." 448 U.S. at 65.[2] As the Illi-

[2] It is unclear whether petitioner is arguing for a rule that would exclude out-of-court statements unless the prosecution either produced the declarant or demonstrated the declarant's unavailability (the principle articulated in *Roberts*) or the broader rule that would permit the admission of out-of-court statements only if the prosecution could demonstrate the unavailability of the declarant, *i.e.*, a rule that would exclude out-of-court statements even if the declarant was produced at trial and testified as a witness. See Pet. Br. 12-14. In any event, the broader rule has been squarely rejected by this Court. See *United States* v. *Inadi*, 475 U.S. 387, 392 (1986) ("if the declarant either is unavailable, or is available and produced by the prosecution, the statements can be introduced anyway"); *California* v. *Green*, 399 U.S. 149, 153-164 (1970); see also *United States* v. *Owens*, 484 U.S. 554, 560 (1988) (no need to show "indicia of

nois Appellate Court recognized, however, that principle cannot be extended to all out-of-court statements. In particular, it does not apply to out-of-court statements of the sort at issue in this case.

*Roberts* itself noted that "[a] demonstration of unavailability * * * is not always required." 448 U.S. at 65 n.7. Moreover, in *United States* v. *Inadi*, 475 U.S. at 392, the Court rejected the argument that under *Roberts* "no out-of-court statement would be admissible without a showing of unavailability." To interpret the Confrontation Clause to require a showing of unavailability as a prerequisite to the admission of any out-of-court statement would render unconstitutional many of the hearsay exceptions long recognized in both federal and state law, since most exceptions to the hearsay rules do not require that the declarant be shown to be unavailable. See, *e.g.*, Fed. R. Evid. 801(d), 803. The Court in *Inadi* made it clear that *Roberts* "does not stand for such a wholesale revision of the law of evidence, nor does it support such a broad interpretation of the Confrontation Clause." 475 U.S. at 392. Rather, the Court held the principle of *Roberts* to apply only to prior testimony, a kind of hearsay for which a showing of unavailability has traditionally been required under both the Confrontation Clause and the rules of evidence. The Court explained (475 U.S. at 394):

> *Roberts* must be read consistently with the question it answered, the authority it cited, and its own facts. All of these indicate that *Roberts* simply reaffirmed a longstanding rule * * * that applies unavailability analysis to prior testimony. *Roberts* cannot fairly be read to stand for the radical proposition that no out-of-court statement can be introduced by the government without a showing that the declarant is unavailable.

---

reliability" of out-of-court statements when a hearsay declarant "is present at trial and subjected to unrestricted cross-examination" regarding those statements).



*Inadi* identified the considerations that distinguish prior testimony from other types of hearsay for purposes of the unavailability requirement. In *Inadi*, the government introduced evidence of out-of-court statements by several members of a drug conspiracy as substantive evidence against a defendant charged with participation in the scheme. The statements were admitted under the co-conspirator exception to the hearsay rule, which does not require a showing that a declarant is unavailable to testify at trial. See Fed. R. Evid. 801(d)(2)(E). Relying on *Roberts*, the Third Circuit held that the Confrontation Clause prohibited the introduction of a co-conspirator's otherwise admissible statements unless the prosecution either produced the co-conspirator to testify or demonstrated his unavailability. This Court reversed, holding that the unavailability rule, "developed in cases involving former testimony, is not applicable to co-conspirators' out-of-court statements." 475 U.S. at 394.

The Court noted that there is a fundamental difference between prior testimony and co-conspirator statements with respect to their evidentiary significance. Former testimony, the Court explained, "is only a weaker substitute for live testimony." 475 U.S. at 394. For that reason, "[i]f the declarant is available and the same information can be presented to the trier of fact in the form of live testimony, with full cross-examination and the opportunity to view the demeanor of the declarant, there is little justification for relying on the weaker version." *Ibid.* By contrast, the Court continued, statements by co-conspirators in furtherance of a conspiracy "are made in a context very different from trial, and therefore are usually irreplaceable as substantive evidence." *Id.* at 395-396. The Court explained (*id.* at 395):

> Because they are made while the conspiracy is in progress, such statements provide evidence of the conspiracy's context that cannot be replicated, even if the declarant testifies to the same matters in court. * * * Conspirators are likely to speak differently

> when talking to each other in furtherance of their illegal aims than when testifying on the witness stand. Even when the declarant takes the stand, his in-court testimony seldom will reproduce a significant portion of the evidentiary value of his statements during the course of the conspiracy.

In addition, the *Inadi* Court determined that there is "little, if any, benefit to be accomplished by the * * * unavailability rule" adopted by the court of appeals in that case. 475 U.S. at 396. The rule would not serve to enhance the quality of the evidence introduced during a trial, the Court pointed out, "because it does not actually serve to exclude anything, unless the prosecution makes the mistake of not producing an otherwise available witness." *Ibid.* In view of the defendant's right to compel the attendance of any available witness, the Court continued, "it is difficult to see what, if anything, is gained by a rule that requires the prosecution to make that declarant 'available.'" *Id.* at 398. The Court also noted that the task of producing or demonstrating the unavailability of each co-conspirator declarant, whether or not either party wished to elicit his testimony, would "place[] a significant practical burden on the prosecution." *Id.* at 399. The Court concluded that "[a]ny marginal protection to the defendant by forcing the government to call as witnesses those co-conspirator declarants who are available, willing to testify, hostile to the defense, and yet not already subpoenaed by the prosecution, when the defendant himself can call and cross-examine such declarants, cannot support an unavailability rule." *Id.* at 399-400.

### B. The Rationale Of The Unavailability Requirement Does Not Apply To The Hearsay Exceptions At Issue In This Case

The Court's reasoning in *Inadi* is equally applicable to the hearsay exceptions at issue in this case. S.G.'s out-of-court statements were admitted precisely because they



had the same kind of special probative value as the co-conspirator statements at issue in *Inadi*. Moreover, extension of the unavailability requirement to the hearsay exceptions at issue here would impose the same burdens on the administration of criminal justice that the Court identified in *Inadi*.

The law of evidence recognizes that in-court testimony is not always preferable as evidence to out-of-court statements. In-court testimony is usually given long after the event, at a time when the legal consequences of the testimony are plainly in view. As a result, witnesses who have an interest in the outcome of the case have both the opportunity and the incentive to shape their testimony accordingly. Similarly, disinterested witnesses are exposed to attempts by parties to influence their recollections and testimony. Courtroom procedures—an oath, the witness's face-to-face encounter with the jury and the parties, and cross-examination—serve to counter, but cannot eliminate, those features of live testimony.

A number of hearsay exceptions, including those at issue in *Inadi* and in this case, recognize that out-of-court statements made without a view to pending or anticipated litigation, in settings that tend to assure their reliability, have special probative value. Those statements are admitted even though they have not been subjected to the safeguards devised for in-court testimony. Because such evidence has different sources of reliability than the procedural safeguards that surround live testimony, it is admitted even if the declarant is available to testify at trial.

The theory underlying these exceptions, which "finds vast support in the many exceptions to the hearsay rule developed by the common law," is that "under appropriate circumstances a hearsay statement may possess circumstantial guarantees of trustworthiness sufficient to justify nonproduction of the declarant in person." Fed. R. Evid. 803 Advisory Committee Note, 28 U.S.C. App. at 777. Congress has subscribed to that view through its

enactment of the Federal Rules of Evidence and the Business Records Act, 28 U.S.C. 1732.

By contrast, the principal justification for receiving prior testimony, the form of hearsay at issue in *Roberts*, is necessity. Like live testimony, prior testimony is given with a view to its legal consequences, but it is inferior to live testimony in at least two respects. The jury is denied the opportunity to examine the witness's demeanor, and the prior testimony may not have been given at a point when the parties had an interest in fully developing the witness's testimony for purposes of the trial. Thus, if a witness is available to testify at trial, there is little justification for admitting prior testimony in lieu of live testimony. *Inadi*, 475 U.S. at 394. See generally 5 J. Wigmore, *Evidence* §§ 1420-1421 (Chadbourne rev. 1974).

1. The hearsay exception for "spontaneous declarations"—under which S.G.'s statements to her babysitter, her mother, and Officer Lewis were admitted into evidence—has the same basic justification as the exception for co-conspirator statements. Excited utterances are admissible because "circumstances may produce a condition of excitement which temporarily stills the capacity of reflection and produces utterances free of conscious fabrication." Fed. R. Evid. 803 Advisory Committee Note, 28 U.S.C. App. at 778; 6 J. Wigmore, *supra*, § 1747, at 195; E. Cleary, *McCormick on Evidence* § 297 (3d ed. 1984) [hereinafter *McCormick on Evidence*].[3] Statements made under the influence of a startling event, like statements made by co-conspirators in furtherance of a

[3] Consistent with the rationale of the exception, excited utterances are not admissible unless they result from an event "sufficiently startling to render inoperative the normal reflective thought processes of an observer," *McCormick on Evidence* § 297, at 854, and "[t]he utterance must have been made before there has been time to contrive and misrepresent," 6 J. Wigmore, *supra*, § 1750, at 202. The state court rejected petitioner's argument that S.G.'s statements to her mother and Officer Lewis did not satisfy the second requirement of the exception. See J.A. 33-36.



conspiracy, are thus unlikely to be influenced by the declarant's calculation of their effect on a future trial. See *Idaho* v. *Wright*, 110 S. Ct. 3139, 3149 (1990). Moreover, they are made within a short time of the pertinent events, which reduces the risk of inaccurate reporting due to loss of memory. For these reasons, the law of evidence in the federal courts, Illinois, and other American jurisdictions excludes excited utterances from the general prohibition on the use of out-of-court statements as substantive evidence.[4]

For the same reason, excited utterances are admissible without regard to whether the declarant is available to testify at trial. The excitement resulting from a startling event "justif[ies] dispensing with any requirement that the declarant be unavailable, because it suggests that his testimony on the stand, given at a time when his powers of reflection and fabrication are operative, is at least no more reliable than his out-of-court statement." *McCormick on Evidence* § 297, at 855. To paraphrase *Inadi*, because excited utterances are made nearly simultaneously with the relevant event, under circumstances that suppress the declarant's capacity to engage in conscious falsification, they "provide evidence * * * that can-

[4] The exception for excited utterances is one of the oldest exceptions to the hearsay rule, having emerged before the end of the 18th century. 6 J. Wigmore, *supra*, § 1747, at 195; see *Thompson* v. *Trevanion*, 90 Eng. Rep. 179 (1693) (admitting evidence of statement by injured woman "immediate upon the hurt received, and before that she had time to devise or contrive any thing for her own advantage"). The exception grew out of the principle that statements constituting part of the *res gestae* of an event are admissible. See, *e.g.*, *Insurance Co.* v. *Mosley*, 75 U.S. (8 Wall.) 397, 405-408 (1869); *Snowden* v. *United States*, 2 App. D.C. 89, 93-97 (1893); *Commonwealth* v. *Hackett*, 84 Mass. (2 Allen) 136, 139-140 (1861); *Commonwealth* v. *M'Pike*, 57 Mass. (3 Cush.) 181, 184 (1849). The exception is very widely recognized, see 6 J. Wigmore, *supra*, § 1750, at 204-221 n.3; 4 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶ 802(2)[2] (1990 & Supp. April 1991), and it has been regarded as a "firmly rooted" hearsay exception. *E.g.*, *Puleio* v. *Vose*, 830 F.2d 1197, 1206 (1st Cir. 1987) (citing cases).

not be replicated, even if the declarant testifies to the same matter in court." 475 U.S. at 395.[5]

2. The same reasoning applies to statements made to medical personnel for purposes of medical diagnosis or treatment—the exception authorizing the admission of S.G.'s statements to her nurse and doctor. The justification for admitting such statements is that persons seeking medical attention have special incentives, distinctly different from those motivating in-court witnesses, to speak truthfully with respect to matters pertinent to their treatment. The reliability of such statements is "assured by the likelihood that the patient believes that the effectiveness of the treatment he receives may depend largely upon the accuracy of the information he provides the physician." *McCormick on Evidence* § 292, at 839; see *Idaho* v. *Wright*, 110 S. Ct. at 3149.[6] In keeping

[5] In addition to the Illinois Court of Appeals in this case, other state courts have held that no constitutional unavailability requirement limits the admissibility of excited utterances. *People* v. *Hughey*, 194 Cal. App. 3d 1383, 240 Cal. Rptr. 269 (1987); *State* v. *Palomo*, 113 Wash. 2d 789, 783 P.2d 575 (1989), cert. denied, 111 S. Ct. 80 (1990). See also *Ferrier* v. *Duckworth*, 902 F.2d 545 (7th Cir.), cert. denied, 111 S. Ct. 526 (1990).

[6] Statements regarding physical pain have been received in evidence since the 17th century, when the hearsay rule itself emerged. 6 J. Wigmore, *supra*, § 1718, at 101 & n.1. See *Barber* v. *Merriam*, 93 Mass. (11 Allen) 322, 324-326 (1865); *Howe* v. *Plainfield*, 41 N.H. 135, 136 (1860); *Aveson* v. *Kinnaird*, 6 East 188, 102 Eng. Rep. 1258 (1805). The hearsay exception for statements to medical personnel is very widely recognized. See *McCormick on Evidence* § 292, at 839-840; 4 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶ 803(4)[2] (1990 & April 1991 Supp.).

The justification for this hearsay exception is fully applicable to children, as long as their statements are made for the purpose of medical treatment or diagnosis. *Morgan* v. *Foretich*, 846 F.2d 941, 949-950 (4th Cir. 1988) (citing cases). Indeed, in some instances, a child's motivation to speak truthfully to a doctor may be even stronger than that of an adult. See *id.* at 949; *United States* v. *Iron Shell*, 633 F.2d 77, 84 (8th Cir. 1980), cert. denied, 450 U.S. 1001 (1981).



with that rationale, such statements are admitted regardless of whether the declarant is available. As in the case of excited utterances, the special reliability of statements made to medical personnel for diagnosis and treatment justifies dispensing with the requirement of a showing that the declarant is unavailable to testify at trial, since the out-of-court statement may well have greater probative value than testimony given by the declarant from the witness stand.

3. Contrary to petitioner's contention (Br. 26-28), the Confrontation Clause does not justify distinguishing between statements by a co-conspirator and those of a "complaining witness," on the theory that a co-conspirator is less likely to seek to incriminate the future defendant. S.G.'s statements were admissible in this case precisely because they were unlikely to be influenced by the motivations characteristic of a "complaining witness"—*i.e.*, a person who has consciously invoked the aid of the police and the criminal justice system by accusing an individual of a crime. There are differences between a frightened child, a patient seeking treatment, and a co-conspirator seeking to advance a criminal enterprise. In terms of the evidentiary significance of their out-of-court statements, however, they all fall on the same side of the line that *Inadi* drew between testimonial declarations and statements made for other purposes. All three statements are made under conditions that give them special probative value and distinguish them from live testimony or the accusations characteristic of a "complaining witness."

4. As in *Inadi*, the rule petitioner advocates would impose severe burdens on the criminal justice system without providing any significant benefit to defendants. Requiring the production of the declarant or proof of the declarant's unavailability in this setting would saddle the prosecution with the task of producing witnesses neither side wishes to examine, without enhancing the defendant's access to any witnesses he could not secure through his own efforts. In this case, for example, there

is not the slightest doubt that the State could have either produced the declarant or established that she was legally unavailable to testify. In fact, at one point S.G. was physically present in the courtroom. Whether or not she was legally available to testify, then, her statements would have been admissible even if an "unavailability" requirement were extended to a case such as this one.

It is equally clear that the absence of an unavailability requirement did not unfairly disadvantage petitioner. If he had wanted to examine S.G., he could have subpoenaed her to testify, and the trial court would then have determined S.G.'s legal availability. Petitioner made no attempt to obtain live testimony from S.G. Indeed, there is no indication that petitioner argued in the trial court, as he did on appeal, that the State was required to produce S.G. for examination. The record thus justifies the inference that the defense saw more advantage in the preservation of a legal argument based on *Roberts* than it did in the opportunity to question S.G. in the presence of the jury.

The effect of an unavailability requirement is to require the prosecution to produce each hearsay declarant whose statement it wishes to introduce—on pain of losing the evidence—even if the defense has no intention of examining any of them.[7] The "mission" of the Confrontation Clause is "to advance the accuracy of the truth-determining process in criminal trials." *Tennessee* v. *Street*, 471 U.S. 409, 415 (1985). See *Maryland* v. *Craig*, 110 S. Ct. 3157, 3163 (1990); *Kentucky* v. *Stincer*, 482 U.S. 730, 737 (1987). That goal is not advanced by the purposeless expenditure of effort inherent in petitioner's position.

Petitioner's argument for extending *Roberts* to a case such as this one gains no support from this Court's de-

[7] Similarly, the courts would be called upon to resolve factual questions regarding the availability of declarants that the defense had no interest in subpoenaing or examining, solely to determine whether the declarants' out-of-court statements were admissible.



cisions addressing the manner in which witnesses may give live testimony in child abuse cases. *Maryland* v. *Craig*, *supra*; *Coy* v. *Iowa*, 487 U.S. 1012 (1988). See Pet. Br. 22-25. The only issue in those cases was the extent of a defendant's right to engage in face-to-face confrontation with a witness who actually testifies at trial. As the Court noted in *Coy*, 487 U.S. at 1016, that question is distinct from the extent to which the Confrontation Clause limits the use of hearsay evidence. *Inadi* establishes that co-conspirator statements are admissible without any showing of availability, but it does not suggest that the government could call the declarant to the stand without affording the defendant an opportunity for face-to-face confrontation. The converse is also true. The fact that a showing of particularized necessity is required before a child witness is permitted to give live testimony by closed circuit television does not suggest that the same showing must be made to admit out-of-court statements that are admissible under the law of evidence and the reasoning of *Inadi*. Because the principles of *Inadi* apply to the hearsay exceptions at issue in this case, the admission of the evidence was therefore consistent with the Confrontation Clause, without the need for a special showing of necessity based on the legal unavailability of the declarant.

## II. S.G. WAS NOT A "WITNESS AGAINST" PETITIONER WITHIN THE MEANING OF THE CONFRONTATION CLAUSE

There is another, more fundamental reason to conclude that the admission of S.G.'s out-of-court statements was not contingent on a showing that she was unavailable: S.G. was not a "witness against" petitioner within the meaning of the Confrontation Clause. The text of the Clause, its history, and the holdings (as well as most of the reasoning) of this Court's decisions are all consistent with that view.

At the time the Sixth Amendment was adopted, as now, a "witness" was understood to be "one who gives testimony" or who "testifies," *i.e.*, "[*i*]*n judicial proceedings*, [one who] make[s] a solemn declaration under oath, for the purpose of establishing or making proof of some fact to a court." *Maryland* v. *Craig*, 110 S. Ct. 3157, 3173 (1990) (Scalia, J., dissenting) (quoting 2 N. Webster, *An American Dictionary of the English Language* (1828)).[8] When she made the statements admitted into evidence in this case, S.G. was not speaking in that capacity. She was not giving "testimony," and her statements were not made "for the purpose of establishing or making proof of some fact."

A frightened child responding to questions from her mother and others while under the emotional influence of an assault is not acting as a "witness against" an individual who may subsequently be charged with a crime arising from the incident. The same is true of a young patient who describes the nature of an assault to medical personnel in order to enable them to ascertain her condition and design an appropriate course of medical treatment. Indeed, as we have shown, the law of evidence authorizes the admission of such statements precisely because they are given under circumstances fundamentally different from those surrounding testimony by a "witness." For purposes of the Confrontation Clause, the term "witness against" more fittingly describes those individuals who actually provide in-court testimony or the functional equivalent—*i.e.*, affidavits, depositions, prior

[8] As Justice Scalia has noted, the term "witness" also referred to any person who was present at an event. As used in the Sixth Amendment, however, the term plainly was not intended to carry that broader meaning. Persons who merely observe matters pertinent to a criminal prosecution are not witnesses "against" the defendant, and it has never been suggested that the Sixth Amendment entitles a defendant to confront observers who contribute nothing to the evidence in a trial. See *Maryland* v. *Craig*, 110 S. Ct. at 3173-3174 (Scalia, J., dissenting).



testimony, or other statements (such as confessions) that are made with a view to legal proceedings.

To be sure, this Court's recent decisions have suggested that all hearsay is subject to scrutiny under the Confrontation Clause—thereby assuming that *all* hearsay declarants are "witnesses against" a defendant within the meaning of the Confrontation Clause.[9] But that assumption has never been explained or justified. It appears to have arisen from the view that only two polar interpretations of the Confrontation Clause are possible—one that would limit the term "witnesses" to persons who actually appear at a defendant's trial, and the other that would reach all hearsay declarants.[10] This case warrants con-

[9] See *Maryland* v. *Craig*, 110 S. Ct. at 3165. For instance, *Bourjaily* v. *United States*, 483 U.S. 171, 181-184 (1987), applied Confrontation Clause scrutiny to statements, made by co-conspirators in furtherance of a conspiracy, that were not made by a "witness against" the defendants as we understand that term. The Court found, in any event, that the statements were admissible. In other cases, the Court has reiterated the "general approach" to hearsay that it first articulated in *Ohio* v. *Roberts*, 448 U.S. at 65, in a manner suggesting that Confrontation Clause analysis is applicable to all out-of-court statements. See, *e.g.*, *Lee* v. *Illinois*, 476 U.S. 530, 543 (1986); *Idaho* v. *Wright*, 110 S. Ct. at 3146-3148.

[10] Justice Harlan's concurring opinions in *California* v. *Green*, 399 U.S. 149, 172-189 (1970), and *Dutton* v. *Evans*, 400 U.S. 74, 93-100 (1970), are the only opinions that have devoted serious attention to the question whether all hearsay declarants are "witnesses" within the meaning of the Confrontation Clause. In *Green*, Justice Harlan identified two "polar readings" of the Clause with respect to that question—one that would "confer nothing more than a right to meet face to face all those who appear and give evidence at trial" and the other that would create "a blanket prohibition on the use of any hearsay testimony." 399 U.S. at 175. Rejecting the view that any distinctions could be drawn among categories of hearsay, Justice Harlan in *Green* argued for a modified version of the broader interpretation, under which all available hearsay declarants would be required to be produced at trial. *Id.* at 182. A few months later, however, Justice Harlan

sideration of an intermediate interpretation—under which the term "witnesses" would be applied to those individuals who are speaking with a view to legal proceedings, not to all persons who have occasion to make statements that may later be admitted into evidence.

### A. The Confrontation Clause Was Not Designed To Police The Development Of Exceptions To The Hearsay Rule

In one of its earliest decisions under the Confrontation Clause, *Mattox* v. *United States*, 156 U.S. 237, 242 (1895), the Court stated:

> The primary object of the [Confrontation Clause] was to prevent depositions or *ex parte* affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury * * *.

That is an accurate characterization of the historical roots of the Confrontation Clause. The common-law right

---

abandoned that position in favor of the view that the Confrontation Clause provides only a right to confront those who appear and give evidence at trial. *Dutton* v. *Evans*, 400 U.S. at 93-100.

Opinions expressing the views of the Court have devoted little attention to the question whether all hearsay declarants should be deemed "witnesses" for purposes of the Confrontation Clause. In *Ohio* v. *Roberts*, for instance, the Court observed that "[t]he historical evidence leaves little doubt * * * that the Clause was intended to exclude some hearsay," 448 U.S. at 63, and the Court then articulated an analytical framework that on its face would reach all hearsay, *id.* at 65-66. The framework articulated in *Ohio* v. *Roberts* has been reiterated in subsequent cases without critical examination of its premise as to the meaning of the term "witnesses" in the Confrontation Clause. *E.g.*, *Maryland* v. *Craig*, 110 S. Ct. at 3165.



of confrontation that the Framers incorporated in the Sixth Amendment arose to protect criminal defendants from the once-common practice of admitting statements to examining magistrates, affidavits, and other similar hearsay in lieu of live testimony in criminal trials. There is no historical basis, however, for regarding the right of confrontation as a general limitation on the admission of hearsay evidence, and in particular as a limitation on hearsay exceptions of the sort that are at issue here.

1. Although the concept of confrontation dates back to Roman times, see *Coy* v. *Iowa*, 487 U.S. at 1015-1016, the common-law right to confrontation did not begin to emerge until the 16th century. Prior to that period, juries rarely heard witnesses, but typically obtained information "by consulting informed persons not called into court." 5 J. Wigmore, *supra*, § 1364, at 13. See Pollitt, *The Right of Confrontation: Its History and Modern Dress*, 8 J. Pub. L. 381, 386-387 (1959). By the end of the 16th century, it had become common for the Crown to offer evidence in criminal proceedings. 9 W. Holdsworth, *History of the English Law* 224 (1926). Even so, a criminal trial in that period did not consist of the structured presentation of evidence through live witnesses that is now taken for granted.

A trial was preceded by an aggressive investigation by examining magistrates. Those officials interrogated the prisoner, accomplices, and other persons with relevant information. See 1 J. Stephen, *A History of the Criminal Law of England* 221, 325 (1883). The magistrates' examinations were "intended only for the information of the court. The prisoner had no right to be, and probably never was present. * * * [T]he depositions were to be returned to the court, but there is evidence to show that the prisoner was not allowed even to see them." *Id.* at 221. After the investigation was complete, the prisoner was arraigned and a jury was sworn. The trial itself consisted principally of an "altercation between the accused, and the prosecutor and his witnesses." 9 W. Holds-

worth, *supra*, at 225. See 1 J. Stephen, *supra*, at 325-326 ("the whole trial, in fact, was a long argument between the prisoner and the counsel for the Crown, in which they questioned each other and grappled with each other's arguments with the utmost eagerness and closeness of reasoning").[11]

There was no requirement that the prosecution rely on live testimony. To the contrary, in courts of common law

> [t]he proof was usually given by reading depositions, confessions of accomplices, letters, and the like; and this occasioned frequent demands by the prisoner to have his "accusers," *i.e.*, the witnesses against him, brought before him face to face, though in many cases the prisoners appear to have been satisfied with the depositions.

1 J. Stephen, *supra*, at 326; see 9 W. Holdsworth, *supra*, at 228. Similarly, in the Star Chamber, "the evidence of witnesses was given upon affidavit." 1 J. Stephen, *supra*, at 338.

The notorious trial of Sir Walter Raleigh for treason in 1603 was illustrative of this feature of early English criminal procedure. The crucial evidence against Raleigh included the deposition of one Cobham and a letter that Cobham wrote thereafter, both of which implicated Raleigh in a plot to seize the throne. Raleigh had a written retraction from Cobham and believed that Cobham would testify in his favor at trial. The court

[11] The deficiencies in this procedure led to recognition of a number of common-law rights of criminal procedure—many of which were subsequently embodied in the Fifth and Sixth Amendments. Stephen noted that 16th century trials differed from those of his day in a number of "important particulars," one of which was that "[t]he witnesses were not necessarily (to say the very least) confronted with the prisoner." 1 J. Stephen, *supra*, at 350. See 9 W Holdsworth, *supra*, at 224; *Gannett Co.* v. *DePasquale*, 443 U.S. 368, 421 (1979) (opinion of Blackmun, J.).



nevertheless rejected Raleigh's demand that Cobham be called as a witness. Pollitt, *supra*, 8 J. Pub. L. at 389. See 1 J. Stephen, *supra*, at 333-336; 9 W. Holdsworth, *supra*, at 216-217, 226-228.

The right of confrontation emerged to put an end to this abuse. Although it is uncertain precisely when the right was formally recognized, the practice of requiring live witnesses in place of depositions and affidavits was well established by the mid-1600s. See Pollitt, *supra*, 8 J. Pub. L. at 389-390; 5 J. Wigmore, *supra*, § 1364, at 23 n.47.

2. A number of state constitutions adopted after the Declaration of Independence recognized a right to confrontation.[12] The Sixth Amendment's Confrontation Clause appears to be patterned after those provisions. In particular, the confrontation provision in the Virginia Declaration of Rights is likely to have influenced James Madison when, in the First Congress, he proposed the amendments that ultimately became the Bill of Rights.[13]

[12] See 1 B. Schwartz, *The Bill of Rights: A Documentary History* 235, 265, 278, 282, 287, 323, 341, 377 (1971) (Va., Pa., Del., Md., N.C., Vt., Mass., N.H.); Pollitt, *supra*, 8 J. Pub. L. at 397-399.

[13] The records of the Constitutional Convention, state ratifying conventions, the First Congress, and proceedings culminating in the adoption of the Bill of Rights include only brief and unenlightening references to the right to confrontation. In several state ratifying conventions, there were complaints about the failure of the Constitution to include a guarantee of individual rights comparable to those in the state constitutions, and in several instances those discussions touched briefly on the right to confrontation. See 2 B. Schwartz, *supra*, at 665, 690, 841, 913. When the First Congress enacted a resolution proposing the Bill of Rights, however, there was no significant discussion of that right. See 1 Annals of Congress 756 (1789) (*reprinted in* 5 P. Kurland & R. Lerner, *The Founders' Constitution* 262 (1987). See generally E. Dumbauld, *The Bill of Rights* 33-49, 53-54 (1957); *California* v. *Green*, 399 U.S. at 175-177 (Harlan, J., concurring).

The history of the Confrontation Clause thus supports Justice Story's observation that the Clause simply codified the common-law right that had earlier been recognized in England, and "follow[ed] out the established course of the common law in all trials for crimes." J. Story, *Commentaries on the Constitution of the United States* 664 (1833). This Court has drawn the same conclusion:

> The right of confrontation did not originate with the provision in the Sixth Amendment, but was a common-law right having recognized exceptions. The purpose of that provision, this Court has often said, is to continue and preserve that right, and not to broaden it or disturb the exceptions.

*Salinger* v. *United States*, 272 U.S. 542, 548 (1926). Accord *Mattox* v. *United States*, 156 U.S. at 243.

3. The right to confrontation is a feature of criminal procedure intended to benefit the defendant. By contrast, the hearsay rule is a feature of the law of evidence applicable to all litigants in both civil and criminal proceedings. During the 17th century in England, "the appreciation of the impropriety of using hearsay statements by persons not called [grew] steadily"; by the early 18th century, the general prohibition on the introduction of hearsay "receive[d] a fairly constant enforcement." 5 J. Wigmore, *supra*, § 1364, at 18. From the outset, however, the hearsay rule was subject to exceptions. Scholars have found that at least the following exceptions had taken shape by the late 18th century: dying declarations, regularly kept records, co-conspirator declarations, evidence of pedigree and family history, and various kinds of reputation evidence.[14] We have found no evidence that

[14] *Patton* v. *Freeman*, 1 N.J.L. 113, 115 (1791) (co-conspirator declarations); 5 J. Wigmore, *supra*, § 1430, at 275 (dying declarations); *id.* § 1518, at 426-428 (regularly kept records); *id.* § 1476, at 350 (declarations against interest); *id.* § 735, at 78-84 (past recollection recorded); *id.* § 1480, at 363 (pedigree and family history); *id.* § 1580, at 544 (reputation evidence). See also 3 W. Blackstone, *Commentaries on the Law of England* 368 (1768).



the common-law right of confrontation or the Confrontation Clause was regarded as a check on these exceptions or on the development of the hearsay rule in general.

### B. This Court's Decisions Do Not Require The Court To Hold That Every Hearsay Declarant Whose Statement Is Offered By The Prosecution Is A "Witness Against" The Defendant

During the past 200 years, the hearsay rule has evolved in both state and federal law. A major aspect of that development has been the recognition of exceptions, like those at issue here, that authorize the admission of out-of-court statements regardless of the declarant's availability. During virtually all of that period, courts regularly rejected arguments that the Confrontation Clause regulates the admissibility of all out-of-court statements.[15]

Until very recently, this Court's cases also provided no support for such a contention. Until *Ohio* v. *Roberts*, all

[15] The Confrontation Clause was "incorporated" in the Fourteenth Amendment and applied to the States in 1965. *Pointer* v. *Texas*, 380 U.S. 400, 403-406 (1965). Prior to that time, the constitutions of virtually every State contained a provision substantially equivalent to the Confrontation Clause. 5 J. Wigmore, *supra*, § 1397, at 155-158 n.1. Many state decisions had rejected claims that admission of hearsay within exceptions to the hearsay rule violated state constitutional provisions. *Id.* § 1397, at 159-162.

Wigmore's position was that the Confrontation Clause "does not prescribe what kinds of testimonial statements (dying declarations or the like) shall be given infrajudicially—this depends on the law of evidence for the time being—but only what mode of procedure shall be followed—i.e., a cross-examining procedure—in the case of such testimony as is required by the ordinary law of evidence to be given infrajudicially." 5 J. Wigmore, *supra*, § 1397, at 159. In our view, however, this Court's cases establish that prior testimony (and other statements of the same basic character) are made by a "witness against" the defendant within the meaning of the Confrontation Clause, and a state statute purporting to admit that testimony in lieu of a live appearance by an available witness would be unconstitutional.

but two of this Court's cases applying the Confrontation Clause to hearsay involved prior testimony or confessions —statements functionally identical to those whose use in early English trials led to recognition of the common-law right to confrontation.[16] The two exceptions held that the admission of statements by co-conspirators in furtherance of a conspiracy did not violate the Confrontation Clause.[17] Nothing in this Court's cases suggested that the Confrontation Clause was applicable to all out-of-court statements.

---

[16] See *Reynolds* v. *United States*, 98 U.S. 145, 158-161 (1878) (testimony at a prior trial); *Mattox* v. *United States*, 156 U.S. at 240-244 (same); *Motes* v. *United States*, 178 U.S. 458, 471-474 (1900) (testimony at "preliminary trial"); *Pointer* v. *Texas*, 380 U.S. at 406-408 (preliminary hearing testimony); *Douglas* v. *Alabama*, 380 U.S. 415, 418-420 (1965) (co-defendant's confession to police); *Brookhart* v. *Janis*, 384 U.S. 1, 4 (1966) (same); *Barber* v. *Page*, 390 U.S. 719, 722-725 (1968) (preliminary hearing testimony); *Berger* v. *California*, 393 U.S. 314 (1969) (same); *Bruton* v. *United States*, 391 U.S. 123, 126-128 & n.3 (1968) (co-defendant's confession); *Roberts* v. *Russell*, 392 U.S. 293 (1968) (same); *California* v. *Green*, *supra* (preliminary hearing testimony and statement to police officer); *Mancusi* v. *Stubbs*, 408 U.S. 204, 213-216 (1972) (prior testimony). See also *Robertson* v. *Baldwin*, 165 U.S. 275, 282 (1897); *Kirby* v. *United States*, 174 U.S. 47, 54-61 (1899); *Dowdell* v. *United States*, 221 U.S. 325, 329-330 (1911); *Diaz* v. *United States*, 223 U.S. 442, 449-452 (1912); *Snyder* v. *Massachusetts*, 291 U.S. 97, 107 (1934); *Bridges* v. *Wixon*, 326 U.S. 135, 153-154 (1945).

[17] *Dutton* v. *Evans*, 400 U.S. 74 (1970); *Delaney* v. *United States*, 263 U.S. 586, 590 (1924). In *Dutton*, no majority of the Court agreed on a common approach to the Confrontation Clause. Four Justices joined a plurality opinion that emphasized their intention not to constitutionalize all aspects of the hearsay rule, 400 U.S. at 86 & n.17, and rested on narrow factual grounds, *id.* at 87-90. Justice Harlan provided the fifth vote; as noted, he concluded that the Confrontation Clause did not regulate the scope of exceptions to the hearsay rule. *Id.* at 93-100. In *Delaney*, the Court rejected out of hand the argument that the admission of co-conspirator statements violated the Confrontation Clause, holding that the admissibility of such statements is "much in the discretion of the trial judge." 263 U.S. at 590.



The view that the Confrontation Clause applies some limitations on *all* hearsay gained its first support in this Court from the "general approach" articulated in *Ohio* v. *Roberts*, 448 U.S. at 65. The breadth of that approach, however, was unnecessary to the decision of that case. The hearsay at issue in *Roberts*, as in many of the Court's prior cases, was the preliminary hearing testimony of a witness who could not be located at the time of trial. This Court held that the testimony was admissible because it had been "tested with the equivalent of significant cross-examination" and the witness was unavailable to testify at trial. 448 U.S. at 70, 77. Nothing in the facts of the case called for the formulation of a test going beyond the kinds of out-of-court statements to which the Confrontation Clause had already been routinely applied; indeed, the principles articulated in *Mattox* v. *United States*, *supra*, and *Motes* v. *United States*, *supra*, were sufficient to decide the case.

In *Inadi*, the Court made clear that *Roberts* did not dictate application of a "rule of necessity" to out-of-court statements other than prior testimony. Nevertheless, the second aspect of the "general approach" described in *Roberts*, which mandates an inquiry into the reliability of out-of-court statements, has been applied in subsequent cases. Thus, the Court has held that the admission of an out-of-court statement is prohibited by the Confrontation Clause unless the statement "falls within a firmly rooted hearsay exception," *Bourjaily* v. *United States*, 483 U.S. 171, 183 (1987), or possesses "particularized guarantees of trustworthiness," *Idaho* v. *Wright*, 110 S. Ct. at 3146-3147.

It is difficult to attribute that kind of inquiry to the Framers of the Bill of Rights. In particular, it is unlikely that the Framers recognized a distinction between those hearsay exceptions that might be adopted and ultimately regarded as "firmly rooted" and those that would not acquire that status. And it seems equally unlikely that the Framers intended the right of confrontation to

be transformed into a general test of the reliability of out-of-court statements. Yet the Court has been driven to that construction of the Confrontation Clause because, starting from the premise that all out-of-court declarants are "witnesses against" the defendant, the plain language of the Confrontation Clause would appear to prohibit the admission of any out-of-court statements against a defendant in a criminal case, a position with no historical support whatsoever.[18]

Where the consequences of following a premise to its logical conclusion are themselves illogical, it is the premise that may be at fault. In this case, the premise—that the term "witnesses against" refers to all hearsay declarants—has crept into the law without close analysis, and it is contrary to the natural meaning of the term "witness," the history of the concept of confrontation as incorporated into the Constitution, and the absence for nearly 200 years of constitutional scrutiny of the evolution of the hearsay rule. The broad conception of the term "witnesses against" that underlies *Roberts* and some of the Court's subsequent Confrontation Clause cases should thus be re-examined. S.G. should not be considered a "witness against" petitioner within the meaning of the Confrontation Clause, and her out-of-court statements should not be excluded on Confrontation Clause grounds.

[18] The only case in which the "general approach" from *Roberts* has been employed to exclude evidence other than prior testimony or testimonial statements to law enforcement authorities is *Idaho* v. *Wright, supra*. In *Wright*, however, the Court did not address the question whether the child declarant was acting as a witness when she made statements to a pediatrician that were excluded under the Confrontation Clause. Moreover, the questioning in that case occurred after the declarant had been taken into custody by police, and the state court's characterization of the questioning suggests that it was designed to develop evidence for a criminal case. See 110 S. Ct. at 3148. The questioning therefore may be regarded as functionally equivalent to other forms of official interrogation that result in statements by a "witness." The decision in *Wright* is therefore not necessarily inconsistent with our position.



## CONCLUSION

The judgment of the Appellate Court of Illinois, Fourth Judicial District, should be affirmed.

Respectfully submitted.

KENNETH W. STARR
*Solicitor General*

ROBERT S. MUELLER, III
*Assistant Attorney General*

WILLIAM C. BRYSON
*Deputy Solicitor General*

STEPHEN L. NIGHTINGALE
*Assistant to the Solicitor General*

JULY 1991

☆ U. S. GOVERNMENT PRINTING OFFICE: 1991 282081 20656